INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers is a nonprofit voluntary business organization organized as a membership corporation under the laws of the State of New York. It is composed of manufacturing concerns, including corporations, partnerships, sole proprietorships, and other forms of business enterprises, located throughout the United States. These concerns range from the very small to the very large and represent about 75 percent of the industrial employment in the United States.

Changing economic conditions frequently require employers to move employees from one business location to another in order to facilitate their business operations. The willingness and ability of their employees to make such moves is an important asset to these businesses.

The Association has an interest in this case by reason of the substantial effect that the decision of the United States Court of Appeals for the Seventh Circuit will have upon its members. If this decision is upheld, it will have a far reaching effect in its impact upon individual taxpayers, business costs and operations, as well as labor mobility and unemployment.

REASONS FOR GRANTING THE WRIT

I. The Questions Presented Have a Substantial Effect Upon a Large Number of Taxpayers, and the Business of Both Private and Public Organizations.

The Petitioners' brief, and others snbmitted in this case, have pointed out the large number of taxpayers which will be affected by the decision. Large as these numbers are, the number of transfers will increase

even more as population increases and as the complexity and interdependence of business becomes greater.

These employees, for the most part, do not move at their own volition, but rather at the direction and for the benefit of their employers. The topmost levels of management are generally not involved. As the Petitioners' brief at Page 10 points out, based on a recent survey, the salary of most of these transferred employees is under $10,000 and about 93 percent of them earn under $15,000 per year.

While the financial losses of employees may be high (a 1963 Civil Service Survey reports that over 4 out of 5 Government employees lose money on such moves),[1] non-financial factors can be equally onerous. Well established family and community ties are broken, and there is uncertainty whether satisfactory new community relationships can be established.

The financial burden on transferred employees is demonstrated by the same Civil Service survey which showed that 17 percent of employees transferred had a loss of more than $1000, and there is every indication that corresponding figures from private industry are much higher. In addition, there are many other types of costs directly resulting from the move. The many costs involved are too well known to require elaboration here. They include costs in connection with the sale and purchase of a residence; such as, closing costs, utility connections, brokers' fees, and the other extraordinary expenses

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[1] Hearings on H.R. 10607 before a Subcommittee of the Committee on Government Operations of the House of Representatives 89th Congress, 1st Sess. September 1 and 14, 1965 at page 15.

incident to the move of a family. While such costs are not at issue in the England case, they unquestionably add substantially to the financial burden of such moves.

Employers with multiple plant or office locations find that it is essential to transfer employees from time to time and often in large numbers for various purposes: for example, to remedy labor shortages, satisfy new markets, adjust to product or technological changes and other conditions. When, in addition to the deterrents to moving which already exist, the employee must contribute, often substantially, to the cost of the move made at the direction and for the benefit of his employer, the reluctance to move is increased and the difficulty of meeting these objectives is compounded.

The imposition of tax on reimbursed moving expenses also constitutes an artificial restriction to improved efficiency and career advancement programs. The importance and magnitude of this was recently indicated with respect to government employees in a letter to the Congress commenting on a bill to reimburse government employees for certain moving expenses.[2] The Chairman of the Civil Service Commission, John W. Macy, Jr., said:

> "... Underlying this proposal is the basic principle that when the employees are transferred at the request of the government the object is to improve the efficiency of the Service ... if experienced employees are unwilling or unable to

[2] Letter from John W. Macy, Jr., Chairman of the United States Civil Service Commission, to the Honorable John W. McCormack, Speaker of the House of Representatives, dated May 20, 1965. See Hearings on H.R. 10607 at page 5 cited above.

> take the financial loss, their agency loses their services. The agency may have to promote less well-qualified people or spend time and money finding, hiring, and training replacements . . . a reasonable degree of geographic mobility is an essential element in a sound career service . . ."

The problems in the areas suggested by Chairman Macy are no less pressing, and in some ways more critical, for private employers.

II. The Decision of the Court of Appeals is in Conflict With the Decision of the Tax Court.

The Court of Appeals, below, decided in effect that all amounts received as allowances or reimbursements for meals and lodging of the employee and his family while awaiting permanent quarters at the new post of duty, are includible in the gross income of the employee. The Tax Court in John E. Cavanagh[3] held that the reimbursement for "extraordinary" moving expenses necessarily incurred by the employee solely as a result of his job transfer are not includible in the employee's gross income.

There is no provision in the Internal Revenue Code of 1954 or the regulations issued thereunder which requires the inclusion in gross income of reimbursement for moving expenses to employees such as the Petitioners.[4]

However, the Internal Revenue Service as a matter of administrative action in Revenue Ruling 54-429, 1954-2 Cum. Bull. 53 excludes from gross income reimbursements for transportation of taxpayers and

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[3] John E. Cavanagh, 36 T.C. 300 (1961).

[4] Id.

their meals and lodging en route. In the same ruling the Service requires the inclusion in gross income of expenses of meals and lodging while awaiting permanent quarters to become available without stating whether such expenses were ordinary or extraordinary in the particular case.

The Tax Court in John E. Cavanagh (cited in footnote 4) upheld the ruling insofar as it considers the "en route" expenses as not includible in gross income. It held the ruling invalid to the extent it holds the extraordinary expenses of meals and lodging at the new site includible in gross income.

The Tax Court said that since expenses of both were "required to be incurred by the employer, they represent repayment to the employee of an amount he has first paid for and in behalf of his employer and do not constitute income to him." The Tax Court pointed out, however, that to the extent the reimbursement covered "the ordinary and necessary food and lodging costs of an employee they represent payment of an *employee's* living expense and are income to him."

Thus the expenses reimbursed did not reflect the expenses the employee would ordinarily have incurred for food and lodging, but were only the expenses that he incurred in excess of these amounts.

The same issue is found in this case. The trial court below, after discussing the Cavanagh case said, "Likewise, in the instant case, the expenses here in question were of an extraordinary nature required to be incurred by the employer and repaid by it."

There are compelling reasons why the reasonable and necessary reimbursements for a house hunting

trip and meals and lodging at a new site to the extent they exceed the ordinary living expenses of an employee, should not have different tax consequences to him from those of "en route" transportation expenses.

First, the expense of meals and lodging while awaiting availability of permanent quarters is a direct consequence of the move. Such expenses are no different than the "en route" expenses which are clearly excludible from gross income.

In an employer directed move, the employee has no control over whether he will incur expenses for meals and lodging while awaiting permanent quarters. Terms of real estate transactions, whether leases or purchase and sale agreements, do not necessarily provide for occupancy at a time which exactly coincides with the move. Frequently it is impossible for a transferred employee to sell one house and arrive with his household effects precisely at the date his new "home" is available. Since the employee cannot control whether the expense for meals and lodging at the site will be incurred, reimbursement for that expense should receive the same tax treatment as transportation or meals and lodging en route, which are also an inescapable consequence of the employer's decision to transfer the employee.

Second, the reimbursement is not compensation to the employee. Section 61(a)(1) of the Internal Revenue Code of 1954 provides that, "gross income means all income from whatever source derived, including (but not limited to) . . . compensation for services, including fees, commissions and similar items . . ."

Certainly the reimbursements in such cases have none of the ordinary characteristics of compensation.

The employer did not treat them as such in his records. And he did not withhold on amounts paid to the employee for these moving expenses. In no sense was the money paid as reimbursement for services to the employee. The employee did not receive an amount in excess of his costs, and this reimbursement was not received as a net gain or reward for moving. In effect, the employee acted as a conduit for the employer in paying these expenses.

Third, although the basis for the inclusion of these moving expenses in gross income is the general statutory language of Section 61(a) of the Code, which provides that "gross income means all income from whatever source derived . . .", nevertheless, in these circumstances there was no increase in wealth to the taxpayer; for, as stated by the trial court: "rather than an increase in wealth, the taxpayers in fact saw their financial situation worsened in carrying out the direct request of the husband's employer to make the move from Kansas City to Springfield."

Finally, these reimbursements fall within the policy guides of the Congress embodied in the Revenue Act of 1964, its first legislative action relative to the tax treatment of moving expenses, which provided partial relief for new and nonreimbursed employees.

The Court of Appeals said it disagreed with the District Court's conclusion as to Congressional intent. The Congress had been silent on policy relating to moving expenses until the Revenue Act of 1964. At that time it said that one of its prime considerations was the elimination of tax deterrents to labor mobility. The House Ways and Means Committee pointed out that one of their objectives in recommending the pas-

sage of the moving expense provisions of the Revenue Act of 1964 was to improve manpower utilization. The Committee report[5] said:

> "Your Committee believes that it is important to remove deterrents to the *mobility of labor*. Anything which can be done in this respect should aid in reducing local structural *unemployment*." (Emphasis supplied.) Almost identical language appears in the report of the Senate Finance Committee.[6]

While this policy was applied in that legislation to new and nonreimbursed employees, it has equal force when applied to reimbursed existing employees.

The Congress provided an opportunity to the Courts to take this policy as well as other factors into account in the ultimate disposition of the treatment to be afforded reimbursed employees. The same House and Senate Committee reports, in commenting on the tax treatment of reimbursed existing employees, said: "The question of . . . existing employees . . . is left for judicial interpretation."

Thus the Congress was seeking judicial determination of the issue in this case. In light of the conflict between the decision in the Seventh Circuit and the Tax Court described by the Petitioners, there is no satisfactory way of providing a uniform judicial interpretation short of the acceptance of jurisdiction by this Court.

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[5] H.R. Rep. No. 749, 88th Cong., 1st Sess. 59 (1963).

[6] S. Rep. No. 830, 88th Cong., 2d Sess. 71 (1964).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the issues presented are important and merit review and determination by this Court. We urge, therefore, that the petition for a writ of certiorari be granted.

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